(1)

No. 90-677

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

HANS WALTER ROECK

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL J. McCABE
Attorney at Law
108 Ivy Street
San Diego, California 92101
Telephone (619) 231-1181

Attorney for Petitioner
HANS WALTER ROECK

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Court of Appeals for the Ninth Circuit holding that under Federal Rules of Evidence § 12(b)(3), petitioner may not raise the issue of the excludability of evidence where the petitioner did not bring a motion to suppress prior to trial because the Federal Rules of Evidence § 404(b) objection did not become apparent until trial was underway.

2. Whether the decision of the Court of Appeals for the Ninth Circuit, affirming the trial court's admission of petitioner's prior wrongful acts into evidence, ignores its own precedent and creates conflict within itself and improperly allowed the admission of unlimited evidence of his prior wrongful acts at trial.

3. Whether sentencing to a higher term following the retrial violated the Due Process Clause of the Fifth Amendment to the United States Constitution where, but for the Petitioner's involvement in numerous civil lawsuits, a lesser sentence would have been imposed.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

HANS WALTER ROECK

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

Petitioner, HANS WALTER ROECK, prays that a Writ Of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered on 25 July, 1990.

OPINION BELOW

On February 7, 1990, the Court of Appeals for the Ninth Circuit filed its opinion affirming petitioner's conviction for transporting a stolen vehicle in interstate commerce in violation of 18 U.S.C. § 2312. A copy of the Opinion of the Court is attached as Appendix A.

On May 15, 1990, Petitioner filed his Reply brief, and on May 29, 1990, Petitioner filed a Motion to File Reply Brief Instanter based on the fact that as of the time of that court's filing of the above-mentioned opinion, no action had been taken on Petitioner's motion for an extension of time to file his reply brief filed on August 22, 1989.

Petitioner's motion was granted and the reply brief was filed within the time permitted.

On July 25, 1990, the Ninth Circuit Court of Appeals ruled that its Memorandum Decision filed February 7, 1990 would remain as set forth whether the reply brief was treated as part of the original appeal or as a Petition for Rehearing. Thus, Petition For Rehearing was denied. A copy of the Order is attached as Appendix B.

JURISDICTION

On July 25, 1990, the United States Court of Appeals for the Ninth Circuit entered its judgment rejecting the Petition for rehearing of its judgment affirming the Petitioner's conviction, originally filed on February 7, 1990. [See Appendices A and B]. The jurisdiction of this court is invoked pursuant to Title 28 United States Code § 1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES INVOLVED

United States Constitution, Amendment V:

"No person shall ... be deprived of life, liberty, or property without due process of law; ... "

Federal Rules of Evidence, § 12(b):

"Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion ... "

Federal Rules of Evidence, § 404(b):

"Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person.... It may, however, be admissible for other purposes, such as proof of motive, ..."

. . .

. . .

. . .

STATEMENT OF THE CASE

On July 10, 1985, the grand jury returned an indictment against Petitioner, HANS WALTER ROECK in the United States District Court for the Southern District of California in criminal case number 85-0589-HBT. The single count of that indictment charged Petitioner with transportation of a stolen vehicle in interstate commerce in violation of Title 18 United States Code § 2312. The jurisdiction of the United States District Court for the Southern District of California was invoked pursuant to Title 18 United States Code § 3231.

Petitioner was initially convicted following a jury trial commencing on January 17, 1986 to January 30, 1986. On March 24, 1986, he was sentenced to three years in custody of the Attorney General. Petitioner filed a motion for new trial on April 4, 1987 based on newly discovered evidence and was granted the motion on October 13, 1987.

Petitioner filed a pretrial motion to exclude certain evidence pursuant to § 404(b), Federal Rules of Evidence. The motion was denied. Petitioner was convicted following the retrial on June 22, 1988 through June 29, 1988. On September 26, 1988, following a hearing, Petitioner was sentenced to five years in custody, two more years than had been imposed following his first trial.

The facts underlying the charge are as follows:

In August of 1984, Petitioner, HANS WALTER ROECK, entered into an agreement with a Peter Gacs whereby Gacs would purchase a Southwind motor home and allow the Petitioner to use it as an on-site sales office for his real estate subdivision and for his family to live in during the interim. In addition, Gacs would provide the Petitioner with $1,000.00 per month, use of a credit card, and use of an apartment for a short period of time. In consideration, Petitioner signed a note agreeing to make repayment and secured the note with real estate in Oregon. Mr. Gacs also stood to gain indirectly in connection with Petitioner's option to purchase the Carmel Valley Spa property, in which Gacs' business partner had an interest. A conditional sales agreement was prepared which gave Petitioner an option to buy the Southwind upon

payment of all monies advanced. Petitioner did not make the promised payments to Gacs.

On February 8, 1985, in Alberta, Canada, Petitioner registered the Southwind motor home in his name, and he was issued Canadian license plates. Petitioner did not disclose that title was in Gacs name. In March of 1985, Petitioner drove to San Diego, California and ultimately negotiated the sale of the Southwind motor home to Harry Schefe and received a $25,000.00 cash payment. The Southwind motor home was not the vehicle on which the petitioner's conviction for transporting a stolen vehicle in interstate commerce was based.

On April 7, 1985, Petitioner negotiated the purchase of a Bluebird motor home from Dr. Chi, of Escondido, California. Petitioner provided a $20,000.00 cash down payment. He agreed to meet Dr. Chi the next day to sign a $30,000.00 note and to arrange the refinancing of the $101,000.00 balance. Petitioner did not appear at the meeting and subsequently failed to execute the note and obtain refinancing. Petitioner drove the Bluebird motor home to Canada without the consent of Dr. Chi. The Bluebird motor home was reported stolen shortly thereafter. This event was the only transaction charged in the indictment.

In June 1985, Petitioner telephoned a dealership in Olathe, Kansas and discussed trading the Bluebird motor home for other vehicles. Petitioner drove the Bluebird motor home to the dealership and ultimately negotiated an agreement to trade the Bluebird for a new Winnebago motor home and $40,000.00 cash. A Canadian registration was produced for the Bluebird by the Petitioner whereby he represented to the dealership that he had clear title.

Petitioner took possession of the Winnebago and the $40,000.00 on June 17, 1985. The dealership notified the authorities after they discovered the Bluebird had been reported stolen in California. On June 24, 1985, the Petitioner was arrested while driving the Winnebago in Twin Falls, Idaho.

During the trial, the prosecution was allowed, over Petitioner's objections, to introduce voluminous testimony regarding the Southwind and Winnebago motor homes. Also over Petitioner's objection, the

sentencing court considered the number of pending civil lawsuits in which the Petitioner is involved as a partial basis for his increased sentence of five years.

REASONS FOR GRANTING THE WRIT

1. There Is A Conflict Between The Ninth Circuit Of the United States Court Of Appeals And The Federal Rules Of Evidence With Regard To The Important Question Of The Admissibility Of Evidence That Is Not Objected To Prior To Trial.

The admissibility of "prior bad acts" concerning the Southwind motor home in the instant case was upheld by the United States Court of Appeals for the Ninth Circuit because Petitioner failed to object to the admission of the evidence.

"Roeck did not object to admissibility of the Southwind evidence, and the objection is therefore waived." United States v. Restrepo-Rua, 815 F.2d 1327, 1329 (9th Cir. 1987). Memorandum Decision (appendix A at 5).

In Restrepo-Rua, the defendant attempted to argue after the trial that the use of a dog in a search rendered that search unreasonable. Id. The Ninth Circuit in Restrepo-Rua held that Federal Rules of Evidence, § 12(b)(3) precluded such an argument based on constitutional rights to be raised after trial. Id. Petitioner's arguments in the instant case do not deal with illegally obtained evidence but rather objectionable evidence produced by the government at the time of trial. The distinction is that the defendant may not know, for example, to what extent the government's evidence is more prejudicial than probative until the trial is under way.

Federal Rules of Evidence, § 12(b) states:

"Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. ... " (emphasis added). Federal Rules of Evidence, § 12(b).

The Notes of Advisory Committee on Rules makes it doubly clear that the purpose of § 12(b)(3) is to provide that evidence obtained unconstitutionally is to be challenged before trial.

> Subdivision (b)(3) makes clear that objections to evidence on the ground that it was illegally obtained must be raised prior to trial. This is the current rule with regard to evidence obtained as a result of an illegal search. (citations omitted). It is also the practice with regard to other forms of illegality such as the use of unconstitutional means to obtain a confession. (citations omitted).

Federal Code and Rules (West's 1989).

Although the Petitioner may bring a motion before trial, in some cases, as in the instant case, the basis on which to object to the admission of evidence does not become apparent until the trial is in progress. To use Restrepo-Rua as a cornerstone to foreclose all argument against the admissibility of evidence unless it is objected prior to trial is in direct contradiction with the Federal Rules of Evidence. Therefore, the petition for Writ Of Certiorari should be granted so that the United States Supreme Court may resolve this conflict.

2. There is A Conflict Within The Ninth Circuit With Regard To The Important Question Of The Admissability Of Prior Wrongful Acts To Establish Motive Under Federal Rules Of Evidence § 404(b) Which Was Not Addressed In This Case.

The evidence of "prior bad acts" concerning the Winnebago motor home in the instant case was upheld by the United States Court of Appeals for the Ninth Circuit as evidence that is allowable to show motive and therefore is not barred under Federal Rules of Evidence § 404(b).

The primary issue at trial was whether defendant had the intent to defraud the Chis when he obtained possession of the Bluebird motor home; therefore, the fact that he subsequently exchanged the Bluebird for $40,000 cash and a Winnebago, after fraudulently registering it in

Canada, is probative of more than the defendant's character. It tends to show that he had motive, intent, and an overall plan relating to his dealings with the Chis and the Bluebird. See, Federal Rules of Evidence, § 404(b). Accord United States v. Morris, 827 F.2d 1348, 1350 (9th Cir. 1987), cert. denied, 479 U.S. 855 (1986). (citations omitted).

Memorandum Decision (Appendix A at 5). This Memorandum Decision completely ignores the Ninth Circuit ruling in the recent case of United States v. Brown, 873 F.2d 1265 (9th Cir. 1989), where that court held that evidence was improperly allowed because the defendant in that case could not have derived a motive to kill from "prior bad acts" directed to persons other than the victim. United States v. Brown, 873 F.2d at 1268.

In Brown, the defendant had brandished and discharged weapons to recover his property from persons other than the victim of the crime charged, prior to the shooting and subsequent death of that victim. The court in Brown held that evidence of prior bad acts must first be linked with the victim before it is possible to show that the defendant derived a motive to commit the crime for which he is charged. Id.

This rule should be applied to the instant case. The acts of Petitioner and his alleged motive to deceive the people involved with the Winnebago can be compared to the unrelated shooting incidents of the defendant in Brown. Brown holds that the government in the instant case must show that the evidence supports a motive to deceive the victim, Dr. Chi, and not others, before it will support a motive for the crime charged. The Ninth Circuit stated in its Memorandum Decision of the instant case, "Roeck's purchase of the Winnebago occurred within a month of his interstate transportation of the stolen Bluebird." Memorandum Decision (Appendix A at 5).

The court could have and should have confined the evidence to Petitioner's dealings concerning the Bluebird motor home with the victim, Dr. Chi. The principal issue at trial in the instant case was whether Mr. Roeck owned the Bluebird motor home at the time it crossed state lines. The story of what happened concerning the

Winnebago does nothing to show whether the Bluebird was "stolen" at the time of the alleged offense.

Brown, articulates a limiting device as to the extent of the evidence allowed under the "motive" exception to § 404(b). There must be a related "link" between the "bad act" evidence and the victim before that evidence is admissible. Brown specifically held that "the prior wrongful acts must establish a motive to commit the crime charged, not simply the propensity to engage in criminal activity." The Ninth Circuit does not discuss Brown, and its analysis using the Morris opinion appears to be in direct conflict with Brown. According to the Ninth Circuit in this case, Morris would seem to permit any and all evidence that might explain the crime and provide a motive. Yet, in the Ninth Circuit's Brown opinion, it held that "the prior wrongful acts must establish a motive to commit the crime charged, not simply a propensity to engage in criminal activity." United States v. Brown, 873 F.2d at 1268.

Any evidence relating to other transactions concerning the Winnebago did nothing to establish a motive for the Petitioner to transport a stolen Bluebird motor home across state lines nearly one month earlier. However, the Ninth Circuit's analysis of Morris makes such evidence admissible without regard to the necessary "link" to the victim as required by the Ninth Circuit's own decision in Brown. Therefore, the Petition for Writ Of Certiorari should be granted so that the United States Supreme Court may resolve this conflict within the Ninth Circuit.

3. Sentencing To A Higher Term Following The Retrial Violated The Due Process Clause Of The Fifth Amendment To The United States Constitution Where, But For The Petitioner's Involvement In Numerous Civil Lawsuits A Lesser Sentence Would Have Been Imposed.

In the instant case, Petitioner's increased sentence following the retrial was upheld by the United States Court of the Appeals for the Ninth Circuit because of additional factors brought to the court's attention that were not before the court in the original proceedings.

> This included: the fact that the defendant concealed assets from the probation authorities following his first trial and conviction; civil

> judgments against the defendant showing that 'defendant's involvement in fraudulent activities is far more extensive than realized at the time of his original sentencing,' ... (emphasis added).

Memorandum Decision (Appendix A at 6).

The contested issue of the effect of the civil lawsuits and the importance of judgments related in the probation officer's report was of critical importance to the sentencing judge. The district court made it very clear that the interpretation of what effect the civil lawsuits had on the Petitioner's assets and liabilities was the determinate factor in imposing the maximum sentence.

> THE COURT: ... When the matters are truly investigated, we find that Mr. Roeck lied to the probation officer on the first instance, he lied to the probation officer on the second instance, he never mentioned any of these judgments. How many he's facing -- he says he's facing a judgment but I query how many he's facing, and therefore, it's adjudged that the Defendant be committed to the custody of the Attorney General for five years ...

(Sentencing Transcript of September 26, 1988 at 25).

The Ninth Circuit recognized that the "Due Process clause prevents increased sentences after retrial if they are motivated by vindictiveness or retaliation on the part of the judge." (citing, North Carolina v. Pearce, 395 U.S. 609, 14 L.Ed.2d 656, 89 S.Ct. 2072 (1969).

However, it failed to consider the legal precedents set forth by this court in numerous decisions. The very threat inherent in the existence of a policy that penalizes those who choose to exercise their constitutional rights, serves only to "chill the exercise of basic constitutional rights." United States v. Jackson, 390 U.S. 570. 20 L.Ed.2d 138,147, 88 S.Ct. 1209 (1968).

This Court has also held that, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" United States v. Goodwin, 457 U.S. 368, 372 (1982), (quoting, Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)).

Petitioner's status of being involved in numerous civil law suits could not possibly be a legitimate factor in sentencing to the maximum term after the retrial. An exercise of one's legal right to sue for breach of contract, or any other action that may arise out of a business dealing dispute cannot be used as a factor to impose a maximum sentence in a case anymore that a legitimate exercise of Fifth Amendment rights may be used to punish a defendant. Roberts v. United States, 445 U.S. 552, 559-61 (1980).

The issue presented in the instant case is of constitutional dimension in that any sentence based upon improper information is a denial of due process of law. The constitutional right is implemented by the August 1983 adoption of Federal Rules Of Criminal Procedure § 32(c)(3)(D).

Federal Rules of Criminal Procedure § 32(c)(2), lists the essentials in a presentence report (PSI) which include: an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or a different length from the one within the applicable guideline would be more appropriate under all the circumstances.

The Administrative Office of the United States Courts has published a guide for the use of federal probation officers in investigating and writing their reports. It is entitled The Presentence Investigation Report (1984). It strongly suggests the need for an accurate, reliable report:

> The probation officer is responsible for searching out all pertinent facts about the defendant, verifying the information gathered, interpreting and evaluating the data, and presenting it in an organized objective report. the officer is responsible for investigating each defendant without preconception or prejudgment as to the outcome of the case.

Presentence Investigation Report, at 3.

The predominant interest in presentence information is accuracy. A judge will not sentence fairly if the court's sentence is based on false information. In Townsend v. Burke, 334 U.S. 736 (1948), this Court has ruled invalid a sentence of a defendant which was based upon false assumptions about his criminal record. In that case, the sentencing court treated as convictions previous charges which had resulted in either dismissals or acquittals. There, the court ruled the sentence a violation of due process of law.

So, too, in the instant case, the Petitioner was convicted on false assumptions that the civil actions in which the Petitioner was involved would result in negative outcomes thereby affecting his assets and liabilities. The sentencing of Petitioner to a higher term following the retrial based partially on Petitioner's involvement in civil litigation flies in the face of this Court's decision in Pearce and its progeny, therefore, the Petition for Writ Of Certiorari should be granted so that the United States Supreme Court may guide the lower courts in this area.

CONCLUSION

For the foregoing reasons, Petitioner HANS WALTER ROECK, respectfully requests that a Writ Of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

DATED: October 24, 1990

MICHAEL J. McCABE
Attorney for Petitioner
HANS WALTER ROECK

PROOF OF SERVICE

I, _____, do hereby state:

I am a citizen of the United States, over the age of 18 years, and not a party to the within action.

My business address is _____, San Diego, California, 92101.

On October 24, 1990, I placed in the United States Mail an envelope containing a copy of **PETITION FOR WRIT OF CERTIORARI, TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT** addressed to the following individuals:

Assistant United States Attorney
U.S. Courthouse, Room 6-N-6
940 Front Street
San Diego, California 92189

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed this 24th day of October, 1990 at San Diego, California.

_____

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellant.	)	No. 88-507
	)	
v.	)	D. C. No. CR85-0589-01T
	)	
HANS WALTER ROECK,	)	MEMORANDUM*
	)	
Defendant-Appellant.	)	

Appeal from the United States District Court
for the southern District of California
Howard B. Turrentine, Senior District Judge, Presiding

Submitted August 22, 1990**

Before: BROWNING, KOZINSKI and RYMER, Circuit Judges

I

Roeck was convicted of one count of transporting a stolen

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

vehicle in interstate commerce in violation of 18 U.S.C. § 2312. He now appeals, claiming (1) venue did not lie in the Southern District of California; (2) the district court improperly admitted evidence of prior bad acts; and (3) the district court impermissibly imposed a harsher sentence upon his retrial. We affirm.

II

On August 20, 1984, Peter Gacs bought a Southwind motor home for $40,000. He finances $32,000 of the purchase price with South Valley National Bank, and the bank retained title as security. Gacs gave Roeck use of the motor home and power of attorney to register it in Oregon, showing Gacs as the owner and the bank as holder of a security interest.

Roeck registered the motor home in Alberta, Canada on February 8, 1985. On April 1, 1985, he executed a bill of sale to Harry Schefe for $25,000. he represented himself as owner of the motor home free of any encumbrances or liens. South Valley National Bank subsequently repossessed the motor home from Schefe.

In April 1985, Roeck answered an advertisement for the sale of a Bluebird motor home owned by Ernesto Chi and his wife. The

Bank of America held a security interest of $100,000 in this motor home. Defendant agreed to buy the bluebird for $150,000, paying $20,000 cash, a $30,000 note secured by a deed of trust on real estate, and refinancing the balance.

The Chis met with defendant and attorney Diane Templin on April 9, 1985. Templin drafted the promissory note and the deed of trust, but, as Roeck's request, the description of property to secure the deed was left blank. Roeck gave Chi $20,000 cash and agreed to meet Chi the next day to finalize the transfer. Instead, he drove the motor home to Canada and registered it.

In June 1985, Roeck made a deal with Burtis Frum, the sales manager at Olathe ford in Olathe, Kansas, to trade the Bluebird for a Winnebago and $40,000 cash. He signed a Vehicle buyer's Order purporting to transfer free and clear title to the Bluebird.

III

Roeck argues that venue did not lie in the Southern District of California. Venue is a question of law which this court reviews de novo. United States v. Abernathy, 757 F.2d 1012, 1014 (9th Cir.), cert. denied, 474 U.S. 854 (1985). It is not an element of the offense; the

government must show venue is proper by a preponderance of the evidence. United States v. Powell, 498 F.2d 890, 891 (9th Cir.), cert. denied, 419 U.S. 866 (1974).

When the statute defining the offense does not specify venue, the place at which the crime was committed "must be determined from the nature of the crime alleged and the location of the act or acts instituting it." United States v. Anderson, 328 U.S. 699, 703, 66 S. Ct., 1213, 90 L. Ed. 1529 (1946), cited in United States v. Medina-Ramos, 834 F.2d 874, 876 (10th Cir. 1987).

The statute under which defendant is charged does not include a venue provision. The elements of the offense charged are (1) the vehicle was stolen; (2) defendant transported the vehicle in interstate commerce; (3) defendant knew the vehicle was stolen at the time of the transportation; and (4) defendant intended to permanently or temporarily deprive the owner of ownership. United States v. Albuquerque, 538 F.2d 277, 278 (9th Cir. 1976). The venue issue turns on whether the defendant formed the intent to permanently or temporarily deprive the Chis of ownership while defendant was in the Southern District of California.

The court did not err in determining that venue lay in the Southern District. Roeck took possession of the Bluebird in Escondido, and agreed to meet with Chi on April 10 to refinance the loan and finalize the transaction. However, he left the area the night before the anticipated meeting. He agreed to give the Chis a $30,000 secured note, but never filled in the description of the property on the deed of trust securing the $30,000 note. Based on these acts, the court properly concluded that Roeck intended, while still in California, to carry out the fraudulent scheme to drive the Bluebird to Canada, register it in his own name, and sell it. Cf. Carlino v. United States, 390 F.2d 624 (9th Cir.), cert. denied, 393 U.S. 872 (1968).

Roeck did not object to admissibility of the Southwind evidence, and the objection is therefore waived. United States v. Restrepo-Rua, 815 F.2d 1327, 1329 (9th Cir. 1987).

The district court did not abuse its discretion in admitting the Winnebago evidence. Frum testified as to his negotiations with defendant and defendant's subsequent purchase of the Winnebago, therefore the evidence was sufficient to support a jury finding that the defendant committed the act. United States v Spillone, 879 F.2d 514,

(9th Cir. 1989).

The prior act was not too remote in time from the conduct charged. Id. at 519. Roeck's purchase of the Winnebago occurred within a month of his interstate transportation of the stolen Bluebird. the acts were also similar. Id.

The primary issue at trial was whether defendant had the intent to defraud the Chis when he obtained possession of the Bluebird motor home; therefore, the fact that he subsequently exchanged the Bluebird for $40,000 cash and a Winnebago, after fraudulently registering it in Canada, is probative of more than defendant's character. It tends to show that he had motive, intent, and overall plan relating to his dealings with the Chis and the Bluebird. See, Fed. R. Evid. 404(b). Accord

United States v. Morris, 827 F.2d 1348, 1350 (9th Cir. 1987), cert. denied, 484 U.s. 1017 (1988) United States v. Jenkins, 785 F.2d 1387, 1395 (9th Cir.), cert. denied, 479 U.S. 855 (1986). Finally, the court properly avoided potential prejudice by instructing the jurors on "other acts' evidence. Cf. Spillone, 879 F.2d at 520; United States v. Mehrmanesh, 689 F.2d 822, 831 (9th Cir. 1982).

V

Sentencing is left to the sound discretion of the trial judge and his decision is reviewed only for an abuse of discretion. United States v. Yarbrough, 852 F.2d 1522,1545 (9th Cir. 1988), cert. denied, 109 S. Ct. 171 (1988).

However, the Due Process clause prevents increased sentences after retrial if they are motivated by vindictiveness or retaliation on the part of the judge. North Carolina v. Pearce, 395 U.s. 711, 725, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). The presumption of vindictiveness is rebuttable. Wasman v. United States, 468 U.S. 559, 104 S. Ct 3217, 82 L. Ed. 2d 424 (1984).

In this case, the trial judge stated on the record the reasons for the change in the sentence. After retrial, the government submitted an extensive sentencing memorandum and recommendation containing information not before the court in the original proceeding. This included: the fact that defendant concealed assets from the probation authorities following his first trial and conviction; civil judgments against the defendant showing that "defendant's involvement in fraudulent activities is far more extensive than realized at the time of his original

sentencing"; testimony presented at the second trial, but not a the first, that defendant wrote several large checks on insufficient funds; testimony by defendant at the second trial which is inconsistent with the testimony under oath at the first trial; the fact that much of defendant's new testimony -- which he alleged justified retrial -- appeared to be untruthful; and the fact that, after retrial, defendant used another person's credit with out permission to buy a Cadillac. These additional factors support the increased sentence.

AFFIRMED

B-1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellant.	)	No. 88-507
	)	
v.	)	D. C. No. CR85-0589-01T
	)	
HANS WALTER ROECK,	)	ORDER
	)	
Defendant-Appellant.	)	
	)	

Before: Brownig, Kozinski and Rymer, Circuit Judges.

Appellant petitioned for rehearing on the ground that his motion to file a late reply brief had not been acted on at the time our Memorandum decision was filed. His request was granted and the reply brief was filed within the time permitted. The reply essentially repeats arguments advanced in the opening brief was filed within the time permitted. The reply essentially repeats arguments advanced in the opening brief, and does not change our analysis. Therefore, whether

treated as part of the original appeal or as a petition for rehearing on the grounds asserted in the reply*, our decision remains as set forth in the Memorandum decision filed February 7, 1990.

Appellant's petition for rehearing is DENIED.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by the Ninth Circuit Rule 36-3.